D.P. VIJANDRAN

v.

KARPAL SINGH

HIGH COURT, KUALA LUMPUR
DATO' LIM BENG CHOON J.
[CIVIL SUIT NO. S7-23-3-1990]
22 JUNE 1993

PRACTICE & PROCEDURE: Plaintiff unilaterally withdrawing suit - Defendant seeking costs in respect of interlocutory applications made prior to withdrawal of suit - Construction of O. 21 r. 2 Rules of the High Court 1980 - Whether withdrawal of suit causes interlocutory applications to lapse - Whether defendant entitled to costs of the interlocutory applications.

The plaintiff instituted a suit against the defendant seeking, *inter alia*, damages for libel. The defendant filed a memorandum of conditional appearance and applied for an order that the writ of summons had not been duly served and to set aside the service of the writ of summons and the statement of claim.

The plaintiff subsequently unilaterally withdrew the suit by filing a notice of discontinuance and the defendant applied for the costs of the various applications made before the withdrawal of the suit. The plaintiff objected to the defendant's application.

Held:

[1] Contrary to the contention of the defendant, the express wordings of O. 21 r. 2 RHC 1980 abjure any suggestion that the said rule is applicable only in cases where there is no interlocutory applications made in a suit prior to its discontinuance. Be that as it may the right of a plaintiff to discontinue a suit whether with or without leave of the Court was subject to his payment of costs in O.59 r. 10(1) RHC 1980.

[2] The defendant was entitled to have his costs of the action taxed. However because of the uncertainty as to whether the defendant was entitled to be paid for the costs of the appeal and the interlocutory applications mentioned in the present application for costs, it was not improper for the defendant to move the Court by way of the summons-in-chambers to seek the determination of the Court regarding his entitlement to the costs incurred in the appeal and the interlocutory applications made by him in the suit.

[3] The works in preparing and filing the notice of appeal had already been carried out by the defendant acting as his own advocate and solicitor. That being the case, the defendant was entitled to ask for costs in respect of the works carried out by him in preparing and filing the notice of appeal.

[4] In reversing the decision of the SAR in so far as she had refused a stay of proceedings, the order made was for "costs in the cause". The term "costs in the cause" may create a problem when a case does not proceed to trial and it was not unreasonable for the defendant to include a prayer in his application for costs seeking the costs of the proceedings relating to the application for a stay of proceedings heard before the learned Judge.

[5] Regardless of the question of whether the summons-in-chambers of 27 December 1990 had or had not been dealt with by the SAR, the defendant was in any case entitled to ask for costs of preparing and filing the said summons as well as for the "getting up" for his submission prior to the hearing of both the summons before the SAR.

[Plaintiff's objection dismissed with costs. Defendant's application to be fixed for continued hearing].

Cases referred to:

Pahang Consolidated Co. Ltd. v. State of Pahang [1932] PCC 391 @ 397 ***(refd)***

Foo Loke Ying & Anor. v. T.V. & Broadcasting (unreported) ***(refd)***

Tan Lay Soon v. Kam Mah Theatre Sdn. Bhd. [1992] 4 CLJ 1922 / [1992] 2 MLJ 434 @ 446 ***(foll)***

J.T. Stratford & Son Ltd. v. Lindley & Ors. (No. 2) [1969] 1 WLR 1547 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 21 r. 2(1), O. 59 r. 10(1), O. 92 r. 4

For the plaintiff - M.S. Murthi; M/s. Murthi & Partners

For the defendant - Karpal Singh; M/s. Karpal Singh & Co.

JUDGMENT

Lim Beng Choon J:

This is an application of the defendant made by way of a Summons-in-Chambers dated 14 August 1992 in which he is asking for costs in respect of the various interlocutory applications

made prior to the plaintiff's withdrawal of the suit unilaterally by filing a Notice of Discontinuance on 22 June 1992. The several items of costs asked for by the defendant have been set out in the said Summons-in-Chambers which I shall be re-producing presently.

The background facts which give rise to the aforesaid application are these. On 9 June 1990 the plaintiff instituted this Civil Suit by a Writ of Summons accompanied by a Statement of Claim. The reliefs asked for are:

(i) damages for slander and/or libel including defamatory words published or spoken by the defendant of the plaintiff and
(ii) an injunction to restrain the defendant whether by himself his servants or agents or otherwise howsoever from further publishing the said or any similar defamatory words defamatory of the plaintiff.

After filing his Memorandum of Conditional Appearance by leave of Court on 6 February 1990, the defendant applied by way of a Summons-in-Chambers dated 8 February 1990 for an order:

(a) affirming that the purported service or service of the Writ of Summons and Statement of Claim on the defendant by A.R. Registered post or post on or about 2 February 1990 be set aside;
(b) declaring that the Writ has not been duly served on the defendant; and
(c) directing that the plaintiff do bear and pay all the costs of and incidental to this application.

This application was supported by an affidavit affirmed by one, Ganesan s/o Thanapalan ("Ganesan"), a clerk attached to the law firm of the defendant known as Messrs. Karpal Singh & Co. on 5 February 1990 in which it was confirmed *inter alia* that the Writ with the Statement of Claim in this suit was served on the defendant by A.R. Registered Post on 2 February 1990. Another affidavit affirmed by the defendant himself on 8 February 1990 was also filed in support of the application in which the assertion of Ganesan was further confirmed. The defendant went on to assert in his affidavit that the Writ should be served personally and not by A.R. Registered post or by post. Hence the purported service or service of the Writ was contrary to the Rules of High Court 1980 and he prayed for an Order in terms of his application.

Before the application of the defendant dated 8 February 1990 was heard, the plaintiff purported to serve on the defendant another copy of the Writ and Statement of Claim on 11 December 1990 which the defendant accepted under protest and without prejudice to his right to apply to set aside the purported service of the said Writ. In respect of the second service of the Writ the defendant again with leave of Court entered a conditional appearance on 15 December 1990. This was followed by the defendant filing another Summons-in-Chambers on 27 December 1990 in which he applied for the following orders (which translated in English read as follows):

(1) an order directing that the service of the Writ and Statement of Claim on the defendant on 11 December 1990 be set aside;
(2) a declaration that the Writ has not been properly served on the defendant; and
(3) an order that the plaintiff do bear and pay the defendant the costs of the application and all incidental costs inclusive of the costs incurred in obtaining leave of Court to enter conditional appearance.

Both the Summons-in-Chambers of the defendant dated 8 February 1990 and 27 December 1990 respectively came on for hearing before the Senior Assistant Registrar ("SAR") on 27 February 1991 but the hearing was postponed to 17 July 1991 and again to 10 October 1991. At the hearing of the 2 Summons-in-Chambers on 10 October 1991 the defendant appeared in person to argue the case on his own behalf while the plaintiff was represented by Mr. Murthi. From the Notes of Proceedings recorded by the SAR in the Court file it is clear that both Counsel directed their respective submissions only in respect of the defendant's application made by way of Summons-in-Chambers dated 8 February 1990. No submissions were made regarding the Summons-in-Chambers dated 27 December 1990 and I have no doubt that the reason for this omission is that as the issues of law and fact in this summons are the same as those in the former Summons both Counsel were of the view that the SAR would be able to give her decision on both the Summons notwithstanding the omission. On 11 October 1991 the SAR pronounced that "Saya tolak permohonan defendant (enclosure 7)." Enclosure 7 of the Court file relates to the Summons-in-Chambers of the defendant dated 8 February 1990. This pronouncement of the SAR confirms that she

had made no decision regarding the defendant's application of 27 December 1990. I mention this because the parties are disputing as to the extent of the decision of the SAR made on 11 October 1991. I should also mention that in my judgment dated 27 November 1991 given in respect of the application of the defendant for a stay of proceedings pending the hearing of his appeal against the decision of the SAR dated 11 October 1991, I wrongly mentioned that the SAR dismissed "the defendant's **applications** to set aside the service of the Writ and refusing to grant the defendant a stay of the proceedings ... " Mr. Karpal Singh immediately wrote to me on 28 November 1991 pointing out the error and explained that the SAR only decided on the application of the defendant dated 8 February 1990 and as regards to the application dated 27 December 1990 of the defendant to set aside the second service of the Writ, the SAR did not make any decision and instead she adjourned the same pending the outcome of the appeal in relation to her decision on the first mentioned application of the defendant. The letter was carbon copied to Mr. Murthi who by his letter of 5 December 1991 asserted that "The Senior Assistant Registrar dismissed enclosure 22 (the application of the defendant dated 27 December 1990) on account of the dismissal of enclosure 7." Be that as it may the error made in my aforementioned judgment is not in issue in the present case since,

(i) the defendant in his Notice of Appeal against the SAR's decision has confined his appeal only "against the decision of the SAR given on the 11 October 1991 dismissing the defendant's application (vide Summons-in-Chambers dated 8th February 1990) (Enclosure 7) and refusing to grant the defendant a stay of filing of the statement of defence pending appeal herein ...",

(ii) the plaintiff has not deemed it fit to raise any objection against the said Notice of Appeal nor has his Counsel raised the matter at the hearing of the defendant's appeal and

(iii) the *ratio decidendi* of my judgment in allowing the stay was that if the stay was not granted and the defendant was required to file his defence in compliance with the Order of the SAR, the very purpose of his application to set aside the Writ *vide* the Summons-in-Chambers dated 8 February 1990 would become useless and would render his appeal against the SAR's decision an exercise of futility.

It follows therefore the error I made in my judgment as stated above does not form part of the subject matter of the appeal of the defendant against the SAR's decision neither does it play a crucial part of my judgment. The error has in any case been corrected before the hearing of the Notice of Appeal. From the above discussions there should be no doubt that the SAR had in her decision of 11 October 1991 dismissed only the defendant' s application dated 8 February 1990. She made no order regarding the defendant's application dated 27 December 1990.

Reverting to the defendant's application for costs, the prayers asked for by the defendant are as follows:

1. The plaintiff do pay the defendant the taxed costs of the appeal to Judge in Chambers pursuant to the Notice of Appeal to Judge-in-Chambers dated 15 October 1991 (enclosure 31) and the taxed costs of the Summons-in-Chambers dated 8 February 1990 (enclosure 7).
2. The plaintiff do pay the defendant the taxed costs of the proceedings relating to the application for a stay of proceedings heard before the Honourable Justice Dato' Lim Beng Choon on 25 October 1991.
3. The plaintiff do pay the taxed costs of Enclosure 22 (Summons-in-Chambers dated 27 December 1990).
4. The suit herein be dismissed with costs to be taxed on the ground appearing in the affidavit of Karpal Singh affirmed on 13 August 1992.

In support of this application for costs, the defendant in his affidavit affirmed on 13 August 1992 deposed in paragraph 10 thereof the following statements:

> 10. I respectfully state, having regard to the facts and circumstances, the plaintiff cannot unilaterally discontinue the suit without having the costs of the various pending applications resolved. It would amount to an abuse of process to do so. Order 21 r. 2(1) of the Rules of the High Court 1980, is, clearly, not applicable having regard to the facts and circumstances prevailing. The Honourable Court has inherent power under O. 92 r. 4 to prevent injustice or an abuse of process of the Honourable Court.

At the hearing of the defendant's application for costs, Mr. Murthi firstly submitted on the scope

of certain rules of the Rules of the High Court 1980 ("RHC"). Thus he argues that under O. 21 r. 2 the plaintiff is entitled to withdraw this suit without leave of Court within 14 days after the filing of the defence and since in the present case no defence has been filed, the withdrawal of this suit is immuned from any challenge. Mr. Karpal Singh on the other hand submits that O. 21 r. 2 would only apply in cases where there is no interlocutory application. The said Order could not therefore apply to this suit where there had been several interlocutory applications made and where there was also an appeal by the plaintiff to the Supreme Court against my decision in allowing a stay of the proceedings. It was only after the Supreme Court has dismissed the plaintiff's appeal that he withdrew this suit. With due respect to Mr. Karpal Singh, I think the contention of his is misconceived simply because if he is seriously contending that the plaintiff has no right to discontinue this suit made under O. 21 r. 2 one may ask as to why did he not apply to this Court to challenge the Notice of Discontinuance which was served on him on 23 June 1992. Indeed by his letter of 3 July 1992, he appeared to accept the said Notice without objection and merely indicated that he would be proceeding with all pending application and would be asking for costs. Furthermore the expressed wordings of O. 21 r. 2 abjure any suggestion that the said rule is applicable only in cases where there is no interlocutory applications made in a suit prior to its discontinuance. I cannot therefore accede to the contention of Mr. Karpal Singh for should I do so I would not be construing the scope of the said rule according to the expressed words but instead I would have to put in words in order to arrive at a construction conformable with the contention of the defendant. Needless to say that such an exercise I cannot do - see *Pahang Consolidated Co. Ltd. v. State of Pahang* [1932] 1 PCC 391 @ 397 and the recent Supreme Court case of *Foo Loke Ying & Anor. v. T.V. & Broadcasting.* Be that as it may the right of a plaintiff to discontinue a suit whether with or without leave of the Court is subject to his payment of costs in O. 59 r. 10(1).

In his submission regarding the scope of O. 59 r.10(1) of Rules of the High Court, Mr. Murthi argued that by virtue of the said rule the defendant is entitled to tax his costs of the action without leave of Court. The present Summons-in-Chambers of the defendant for costs is therefore misconceived. Now O. 59 r. 10(1) reads as follows:

> 10(1) Where a plaintiff by notice in writing and without leave either wholly discontinue his action against any defendant or withdraws any particular claim made by him therein against any defendant, the defendant may tax his costs of the action of his costs occasioned by the matter withdrawn, as the case may be, and, if the taxed costs are not paid within 4 days after taxation, may sign judgment for them.

It is to be noted that the said rule provides two circumstances in which a defendant can proceed to tax his costs without leave of Court namely;

(i) when the plaintiff wholly discontinues his action and
(ii) when the plaintiff withdraws any particular claim made by him against the defendant.

In the present case the plaintiff has wholly discontinued the action and it cannot be disputed that the defendant is entitled to have his costs of the action taxed. Be that as it may the reason for the defendant in filing this Summons-in-Chambers for costs is, as can be seen in the prayers sought, because of the uncertainty as to whether the defendant is entitled to be paid for the costs of the appeal and the interlocutory applications mentioned in the present application for costs. It is for this reason that the defendant deems it appropriate to have the matter settled by this Court. It is true that the matters can be argued at the taxation stage before the SAR but the SAR's decision on the matter is subject to review by this Court. In the circumstances of this case I have no doubt in my mind that any decision made by the SAR would be brought before me for a review of her decision and this would certainly increase the costs and unnecessary wastage of time. In any event pursuant to O. 92 r. 4 the Court has inherent powers to make **any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.** The scope of O. 92 r. 4 and the inherent powers of the Court is neatly explained in the case of *Tan Lay Soon v. Kam Mah Theatre Sdn. Bhd.* [1992] 2 MLJ 434 @ 446 in these words:

> ... In so holding, the Court of Appeal had followed *Smith v. Peters* in which it was held that the Court has jurisdiction to make any interlocutory order which is reasonably asked

as ancillary to the administration of justice at the hearing of the cause.

The cases of *Astro and Smith v. Peters,* were cited with approval by the Federal Court in *TR Hamzah & Yeong Sdn. Bhd. v. Lazar Sdn. Bhd.* wherein reference was also made to the provisions of O. 92 r. 4 which reminds the High Court of its inherent powers to make any orders as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

For the above reasons I am satisfied that it is nothing improper for the defendant to move this Court by way of the Summons-in-Chambers dated 14 August 1992 in order to seek the determination of the Court regarding his entitlement to the costs incurred in the appeal and the interlocutory applications made by him in this suit.

I shall now turn to Mr. Murthi's arguments concerning the reliefs prayed for in the present application of the defendant for costs.

In dealing with prayer 1 of the Summons-in-Chambers dated 14 August 1992 Mr. Murthi suggested (if I understand him correctly) that as the plaintiff had discontinued this suit, the Notice of Appeal of the defendant to the Judge-in-Chambers against the SAR's decision dismissing his application to set aside the Writ and also refusing the stay of this action, should also lapse. In any case, so said Mr. Murthi, the plaintiff might well be able to convince the Court that the SAR's decision was correct in which case the Court should dismiss the defendant's appeal with costs to the plaintiff. With respect to the learned Counsel, his contentions, to my mind, are completely irrelevant. Here the defendant is asking for the taxed costs in respect of works done by him in his capacity as solicitor acting on his own behalf in preparing and filing the Notice of Appeal against the SAR's decision of 11 October 1991. That being the case it cannot be disputed that even assuming, without deciding that the Notice of Appeal had lapsed as a consequence of the plaintiff's withdrawal of this suit, nevertheless the works in preparing and filing the said Notice had already been carried out by the defendant acting as his own advocate and solicitor. That being the case the defendant is, to my mind, entitled to ask for costs in respect of the works carried out by him in preparing and filing the Notice of Appeal. It follows therefore that there is nothing improper on the part of the defendant in asking for the relief as set out in the said prayer 1.

With regard to prayer 2, Mr. Murthi conceded that the defendant was entitled to the costs prayed for in that prayer 2 but he said that the defendant had "no right to ask for another order." I regret to state that I cannot agree with the contention of Mr. Murthi. It is to be noted that in reversing the decision of the SAR in so far as she had refused a stay of the proceedings I ordered "costs in the cause". The term "costs in the cause" may create a problem when a case does not proceed to trial - see for instance *J.T. Stratford & Son Ltd. v. Lindley & Ors. (No.* 2) [1969] 1 WLR 1547. That being the case it is again not unreasonable for the defendant to include prayer 2 in his application for costs.

As to prayer 3, Mr. Murthi suggested that that prayer was incompetent meaning that the defendant was not entitled to ask for the relief prayed for in prayer 3 on the ground that the Summons-in-Chambers referred to in prayer 3 was still with the SAR and had not been heard yet. It is rather amusing to note that this contention of Mr. Murthi is inconsistent with his earlier insistence made to the defendant that the SAR had dismissed the defendant's Summons-in-Chambers dated 8 February 1990 as well as his Summons-in-Chambers dated 27 December 1990. Be that as it may I regret to have to say that regardless of the question of whether the Summons-in-Chambers of 27 December 1990 had or had not been dealt with by the SAR the defendant is in any case entitled to ask for costs of preparing and filing the said summons as well as to do some "getting up" for his submission prior to the hearing of both and I repeat both, the said summons before the SAR which finally took place on 10 October 1991 after two postponements. For the above reasons the objection of the plaintiff is dismissed with costs and the present application of the defendant made by way of Summons-in-Chambers dated 14 August 1992 is to be fixed for continued hearing by this Court.